

MINUTES
MICHIGAN STATE TRANSPORTATION COMMISSION MEETING
April 25, 2002
Lansing, Michigan

Meeting noticed in accordance with Open Meetings Act, Public Act 267 of 1976.

Present: Barton LaBelle, Chairman
 Ted Wahby, Vice Chairman
 Betty Jean Awrey, Commissioner
 Lowell Jackson, Commissioner
 John Garside, Commissioner

 Charles Krupka, Commission Advisor
 Jerry Jones, Commission Auditor
 Vickie Plummer, Executive Secretary
 Pat Isom, Assistant Attorney General
 Greg Rosine, Director
 Barb Hayes, Chief Administrative Officer
 Larry Tibbits, Chief Operations Officer
 Philip Kazmierski, Bureau of Urban and Public Transportation
 William Gehman, Bureau of Aeronautics
 Gary D. Taylor, Bureau of Highway Technical Services
 Louis Lambert, Bureau of Transportation Planning
 Tom Maki, Office of Strategic Planning & Initiatives

A list of those people who attended the meeting is attached to the official minutes.

Chairman LaBelle called the meeting to order at 10:10 a.m. in the Bureau of Aeronautics Auditorium, Lansing, Michigan.

COMMISSION BUSINESS

Commission Minutes

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to approve the minutes of March 28, 2002, as submitted. The motion carried on a unanimous voice vote.

Election of Vice Chairman

It was moved by Commissioner Garside, with support from Commissioner Jackson, to reappoint Commissioner Wahby as Vice Chairman. The motion carried on a unanimous voice vote.

COMMISSION POLICY

Performance Warranties

Commissioner Jackson noted his disappointment that discussions on this issue had to take place in the face of impending legal actions and expressed the importance of making a policy statement today. This policy will insist upon the development of a warranty program. The Commissioner is encouraged by the opportunity for contractor innovations.

It was moved by Commissioner Jackson, with support from Commissioner Awrey, that the following be adopted by the Commission as policy on performance warranties:

“The Michigan Department of Transportation (Department) shall continue the development of highway warranties that encourage contractor innovation, as feasible, with an associated and appropriate level of contractor accountability for the performance of the highway. The enhanced opportunity for contractor input and control should be balanced by a greater assumption of warranty liability by the contractor. In general, contractor liability should be with regard to matters over which the contractors have an opportunity to enhance a standard highway design to assure that it will meet the Department’s desired performance standards.”

The motion was carried on a unanimous voice vote.

Chairman LaBelle directed the Department to continue discussions with the industry to address their concerns as details are developed for performance warranties. The Chairman also directed the Department to develop a method, in writing, on how the Department will report back to the Commission the details of the rules of the policy, how and when reports will be provided to the Commission, either semi-annually or annually, the number of jobs that include performance warranties, and what type of monitoring tools will be used.

OVERSIGHT

Commission/State Administrative Board Contracts and Agreements (Exhibit A)

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to grant approval to the Department to proceed with the contract process. The motion carried on a unanimous voice vote.

Bid Letting Pre-Approvals (Exhibit A-1)

It was moved by Commissioner Garside, with support from Commissioner Awrey, to grant approval to the Department to proceed with the contract process. The motion carried on a unanimous voice vote.

Letting Exceptions (Exhibit A-2)

It was moved by Commissioner Jackson, with support from Vice Chairman Wahby, to grant approval to the Department to proceed with the contract process. The motion carried on a unanimous voice vote.

Information Items (Exhibit A-3)

Charlie Krupka, Commission Advisor, noted changes were made to Item 1 on page 3 of Exhibit A-3. The "low bid" should read "\$119,910" and "percent over/under estimate" should read "-26.43 percent." The bid by Mercier's, Inc., was originally rejected, but the rejection was overturned by the Bid Appeal Committee and Mercier's, Inc., was awarded the contract.

This exhibit is for information only and does not require approval by the Commission.

Contract Adjustments

It was moved by Vice Chairman Wahby, with support from Chairman LaBelle, to approve the contract adjustments. The motion carried on a unanimous voice vote.

RESOLUTIONS

Comprehensive Transportation Fund Bond Refinancing

Ann Dennis, Bureau of Finance and Administration, provided an explanation of the final resolution authorizing the issuance of the State of Michigan Comprehensive Transportation Fund (CTF) Refunding Bonds and requested Commission approval of the resolution. Refunding of these bonds meets the requirements of bond guidelines, and with approval of this resolution the Commission delegates to the Director the authority to finalize the bond issuance.

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to approve the resolution as submitted. The motion carried on a unanimous roll-call vote.

Director Rosine commended Ann Dennis and Jerry Jones for receiving nominations by the Association of Government Accountants for the financial manager of the year award. Mr. Jones was nominated for his efforts in reviewing internal controls for state government, and Ms. Dennis was nominated for her work on the State of Michigan Comprehensive Annual Financial Report.

PUBLIC COMMENTS

Kelly Thayer, Michigan Land Use Institute (MLUI), provided information on the public transit report "New Economic Engine." This report ranks Michigan on a national scale by comparing its transit funding to other states for the year 2000. MLUI is seeking to maximize current transit funding sources to the extent allowable, with the CTF receiving a full ten percent of state transportation funds, and identifying new funding sources such as directing a portion of the use tax from automobile leasing to support transit. Mr. Thayer noted that other states use corporate franchise taxes, casino money, and lottery money to support transit. He furthered that he would like to see the Department continue to partner with transit agencies in recouping maximum federal dollars for transit.

Kevin Wisselink, United Cerebral Palsy of Michigan, noted that one finding in the report was that 34 of the 83 counties in Michigan do not have full transit coverage for riders with disabilities. The Michigan Legislature has recognized the importance of providing transit services by requiring paratransit service be made available throughout the state, but appropriate funding has not been made available. The process to provide funding and service coordination throughout Michigan needs to be accelerated.

Chairman LaBelle pointed out that the Commission does have a policy on transit that directs resources to go to transit dependent individuals. It is also the belief of this Commission that local regions and communities should be held responsible for initiatives for their own transit needs.

Commissioner Jackson pointed out Michigan's federal liaison reported to the Commission that she and the congressional delegation are currently attempting to get some of the heavy rail monies back for transit in Michigan. He also noted that Michigan's standing on per capita is very good compared to other states that, like Michigan, do not have heavy rail systems.

PRESENTATIONS

Director's Report

Director Rosine provided information on the Departments "dashboard" tool which is a series of measurements, monthly and annually, that can be used to review the overall performance of the Department on a regular basis.

The Director also noted that flooding occurred in the Upper Peninsula last week which affected state roadways, making it necessary for an emergency response to repair roads to make them operational.

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By mid May the Director will provide a report to the Commission on how the Department will be affected by the early-out retirements effective at the end of April.

ADJOURNMENT

Chairman LaBelle adjourned the meeting at 10:50 a.m.

Commission Advisor

MINUTES
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Chairman LaBelle called the meeting to order at 8:10 a.m. in the Bureau of Aeronautics Auditorium, Lansing, Michigan.

PERFORMANCE WARRANTIES

Comments by Michigan Department of Transportation (MDOT) Director

Greg Rosine, MDOT Director, provided information on recent events involving performance warranties. MDOT and the industry have been working on an alternate-bid project on M-6 to include warranty provisions. At the last State Transportation Commission meeting two projects which included performance warranties were brought before the Commission for approval. These projects were on I-94 in Macomb County and US-24 in Wayne County.

On April 4, 2002, the Michigan Road Builders Association, Association of Underground Contractors, Michigan Paving Association, and Michigan Concrete Paving Association sued MDOT to prevent the use of warranties on the I-94 and US-24 projects scheduled for

the April 5, 2002, letting. The court denied an injunction against these projects and the contracts were let on April 5 as scheduled. There were four bidders for each project, all below the engineer's estimates, and the projects are being awarded. A trial is now scheduled for June 10, 2002.

During the same time period, a contractor on the US-131 project suggested a change be made in the design to include non-reinforced concrete, and the contract language was changed to include this design and a seven-year warranty provision making the contractor responsible for all failures related to spalling and scaling at no expense to MDOT. Discussions are now taking place on two additional requests by contractors to change the design of concrete projects to offer warranties.

Pavement warranties protect taxpayers' investments by reducing pavement failures, reducing maintenance costs, reducing life-cycle costs, and ensuring that contractors see projects as an investment of their expertise, craftsmanship and reputation.

Terms of warranties for highway projects can vary depending on many circumstances. One example is for an agency to specify the construction method in detail with contractors bidding projects to the exact specifications with no warranty attached. Another example is for an agency to specify a desired level of performance where contractors accept responsibility for creating a design to meet the performance specifications and the contractor warranties materials, workmanship and design. There are many variations that can occur between workmanship warranties and performance warranties. Terminology seems to be a stumbling block during the development of warranties.

Since 1996, there have been 363 warranties included on capital preventive maintenance projects and 88 warranties on rehabilitation and reconstruction projects.

In 1997, the Michigan Legislature amended Act 51 and directed the Department to pursue warranties. Rehabilitate and reconstruct warranties started as two- or three-year warranties and have progressed to five-year warranties. Michigan has been working with both asphalt and concrete industries to develop these warranties.

Over the last two years, the annual appropriations bills have included strong language directing the Department to continue to develop warranties. The Department has also been given clear direction by the Governor's office that it is important to develop warranties. And, at the last State Transportation Commission meeting, the Commission directed the Department to aggressively pursue the development of warranties while remaining sensitive to the industry.

The Department will attempt to address industry concerns and will not ask contractors to assume responsibility for circumstances that should not reasonably be asked of them. The Department will also continue its efforts to use warranties that maximize the contractor's

commitment to the quality of their work. While basic concerns can be addressed prior to implementation, it is most effective to address other concerns in a competitive bidding environment.

The Department recommends the following: Continue using the entire spectrum of pavement warranties to protect taxpayer investment. Continue developing warranties that encourage contractor innovation with an appropriate level of accountability for the performance of the highway. Take an incremental approach while cost and performance implications are evaluated. Follow established criteria when warranties require contractors to assume responsibility for design elements.

Warranties requiring contractors to assume responsibility for some of the elements of design should meet the following criteria: Projects should be either new or reconstruction projects. Projects should be programmed adequately to fund existing subbase deficiencies and should include funds to address any remedial action needed on the subbase. The terms of the warranty should be adjusted to account for the condition of the subbase. The Department should continue to collect data and evaluate the life-cycle cost and value in using warranties on various types of roadways, encouraging the industry to participate and sharing the costs of this process. The Department should involve the industry in its program for inspecting highway performance on warranty projects. The Department should continue to maintain a strong program to assure quality control, commensurate with the contractors assuming greater responsibility for highway performance. The Department recommends starting with seven-year performance warranties moving to ten-year warranties, which is approximately half of the anticipated project life. Future warranty specifications should contain language to relieve industry concern that contractors will be asked to assume responsibility for matters over which they have no control.

To assure warranty provisions are in full compliance with the law, future warranty specifications should contain language to the effect:

- A. Insofar as it would be violative of Michigan Compiled Law (MCL) 691.991, if a performance deficiency is attributable to the sole negligence of the Department, the contractor will not be liable for that deficiency.
- B. To the extent that a contractor provides a part of the design of a project, the contractor must assure that it has a licensed professional engineer preparing those plans and specifications, in accordance with applicable provisions of the Occupational Code, 1980 Public Act (PA) 299. The Department shall assure that its participation in the design and supervision of the project is in accordance with applicable provisions of the Occupational Code, 1980 PA 299.
- C. Where, under the terms of a warranty the Department requires that the contractor perform a project in a specific way (this generally refers to what is commonly called

the design of the project), the contractor will not be held accountable for a performance deficiency if the contractor can: (1) provide clear and convincing evidence, (2) that the deficiency is attributable to something that the Department required the contractor to do, and (3) that the discretion and control given to the contractor to make changes in how the contract work was to be performed, did not allow the contractor to reasonably take measures to overcome any inadequacy in the Department's requirements.

The Director noted that the document provided to the Commission today was provided to the industry last Tuesday, as soon as the final version was developed.

It is the request of the Department that the Commission adopt the recommendations presented today as policy.

Questions and Comments by Commissioners

Commissioner Jackson noted that it appears the document provided by the Department has addressed the prior concerns of the industry that contractors not be held responsible for items not under their control. He further encouraged the Department to move forward with this issue, making sure appropriate language is used to protect the contractor from unfair disadvantage as a result of any warranty agreement.

Pat Isom, Assistant Attorney General, commented that Paragraphs A, B, and C in the document were specifically written to address the claims that were made in the law suit on the subject of control. When a failure occurs, it is presumably an interaction between materials, workmanship, and design making it hard to decide the contributing factors. Under the terms of a performance warranty, a contractor will not be held accountable for a performance deficiency if the contractor can show that the deficiency is attributable to something that the Department required the contractor to do in the design of the project, and that the discretion the Department gave the contractor would not have reasonably allowed the contractor to fix the problem. The contractor is asked to join in the responsibility for designing the project, and assessing and determining whether anything should be improved in quality, and to factor that into their bid price. The idea is that the contractor, along with their consulting engineers, are in the best position to review the materials and workmanship design together to ensure a product will perform.

Commissioner Garside asked who would make the final decision on clear and convincing evidence. Mr. Isom responded that the contract has a partnership mechanism for deciding disputes. There is to be a five-member panel, two members appointed by the contractor, two members appointed by the Department, and a fifth member selected by the first four members, who will decide who is responsible for the problem.

Comments by Michigan Asphalt Paving Association (MAPA) Representative

Rayburn King, Executive Vice President of MAPA, noted for the record that MAPA is not involved in the lawsuit against the Department. MAPA represents 73 members which produce 63 percent of the hot mix asphalt produced in the State of Michigan. MAPA realized MDOT planned to move ahead with performance warranties and knew that there were legislative initiatives backing up the Department's position, and they decided to be a participant in order to be an influence. More importantly, MAPA wanted to try to keep the focus of the warranties on new or reconstructed pavements. These are pavements that the public has the most invested in, both in dollars and in driver delay, and that the public has the most concern about when they fail. These are also the pavements with the lower risks for contractors because they are either building a new road from the ground up, or the old pavement is completely removed and replaced with new.

It is known that good pavement can be built, but the performance of good pavement cannot be predicted when built on old sub-grade. The transfer of road building responsibility to contractors has been occurring in Europe for approximately 10 years, and now in approximately one-third of the United States. There are several reasons for this.

First, highways need rehabilitating and the contracting industry is trying to work under increasingly heavy traffic volumes. Motorists realize the need to have access to the pavement in order to restore it. They are demanding fewer and shorter delays and they demand more durable pavements that do not need repair.

Second, the public understands the warranty concept as they see some type of warranty on every product they purchase. A warranty is a guarantee of the integrity of a product, and of the maker or installer's responsibility for repairs or replacement of deficiencies that may occur during the warranty period. In the case of road building warranties, they are performance based with criteria directly related to the motorists and the State of Michigan's expectations. There are industry innovations that need to be tried in order to develop new and better products in industry. Performance warranties for pavements will provide the opportunity for enhancing the designs to be used.

And last, it is MAPA's position that they can no longer do business as usual. MDOT wants to build the best roads possible and minimize the impact to their customers, the motoring public, and they want to get the most for their highway dollar spent. They have to do this with diminishing staff due to attrition and retirements. In MAPA's opinion, MDOT does not have the human resources to inspect every step of the construction process. Consequently, it is natural that they would move to an end-result specification which depends more on industry participation.

MAPA contractor members support this because they are business owners first, and just like any business owner, they are not in favor of occurring any unnecessary or excessive

risks. There has been excellent performance on member jobs that have been built under the materials and workmanship warranties, and on the one design/build project done by a MAPA member. They have confidence in their materials and their abilities as contractors.

Mr. King pointed out that of 88 projects in rehabilitation and reconstruction work, 75 of those projects include asphalt pavements, so there is a data base of historical information. MAPA has reviewed data from the Wisconsin Department of Transportation which has used performance warranties on their projects for five years. This shows fewer pavement defects and smoother pavements than on non-warranty jobs. Mr. King is confident that this industry has the technical ability to select the proper mix designs and to build smooth, durable asphalt pavements that are long lasting.

As the Department moves to a type of warranty with design elements that demand more from the contractor in terms of responsibilities and liabilities, then MAPA expects to have more flexibility and more control over their work.

Mr. King further noted that MDOT has a comprehensive procedure for monitoring the condition of its pavement and a programmed maintenance plan. The sharing of data with the contracting industry is essential to the process of contractors assessing their risk on future projects. Setting warranty parameters and evaluating results should be a public/private partnership. He emphasized that MDOT staff needs to understand that flexibility is a key factor as more accountability is shifted to the industry. Flexibility and expanded control over their own work is necessary if the industry is going to implement new innovations in pavement design and to get resulting anticipated lower life-cycle costs.

In conclusion, MAPA would like to meet with Department staff at a later date to further discuss the document presented today.

Comments by Michigan Road Builders Association (MRBA) Representative

Tony Milo, Executive Vice President of MRBA, explained that this organization represents concrete and asphalt industries, large and small, and supporters and opponents of performance warranties. He expressed his desire for an equitable and fair resolution to the current warranty situation. Mr. Milo distributed the MRBA Policy Position on Warranties in Highway Construction approved by their board of directors on June 1, 2001, and which was distributed to the Department. This document outlines eight specific suggestions on how warranties could work in Michigan and help taxpayers, without hurting the current competitive industry.

MRBA is frustrated that none of the eight suggestions were included in the I-94 performance warranty specification or the Telegraph Road specification. As a partner of

MDOT, MRBA believes their suggestions should be recognized and at least partially included in MDOT's proposals.

Mr. Milo provided a copy of a letter to Greg Rosine dated November 1, 2001, which outlined six issues not addressed by the Department. These issues are: the duration of the warranty and bonding concerns, holding the contractor responsible only for what they control, limiting the maximum liability of the contractor, allowing MDOT to recognize a warranty bond directly from the subcontractor performing the warranty work item, moving beyond the current warranty provisions only with the support of the specific industries being impacted, and making it clear that MDOT is the owner of the facility and responsible for its use and design liability. It is the position of MRBA that none of their concerns were addressed in the current warranty specifications implemented by the Department.

Another document provided was a letter to Greg Rosine dated April 23, 2002, from the Michigan Chamber of Commerce. Mr. Milo read from the letter "The Michigan Chamber strongly believes that every hour and every dollar spent in litigation over warranties is time and money that would be better spent building bridges and fixing roads. If there is a reasonable middle ground on this issue, we urge you to find it promptly." Mr. Milo expressed his agreement with the statement and noted that MRBA would rather be working together with MDOT to get more federal road dollars for Michigan than fighting over warranties.

After Mr. Milo's statement, Chairman LaBelle asked if MRBA would be dropping the lawsuit to save litigation costs, which is an unnecessary and wasteful expenditure of taxpayers dollars. Mr. Milo responded MRBA was forced into this position due to the fact their eight specific recommendations were not considered.

Mr. Milo continued that the recommendations presented to the Commission today are a step in the right direction, with a foundation for middle ground. MRBA does have some suggestions on the recommendations, but did not have time to formulate a comprehensive recommendation on the specific policy. MRBA's focus today is for the Commission to state strongly that contractors cannot guarantee what they do not control, and Mr. Milo does not believe that the recommendations presented today state this. There has not been enough time for a legal review of the document.

Mr. Milo would like to see the Commission take a balanced public policy approach to warranties rather than reacting to the lawsuit, and would like to see MDOT and the industry partner to make recommendations for a comprehensive policy for the Commission to adopt. He believes it would be premature for the Commission to adopt a policy today.

Commissioner Jackson asked Mr. Milo to comment on the information that there are a number of states that essentially have the same kind of impact on roads as MDOT in relation to weather, vehicle weights, etc.; the concern of MRBA that they are being held

responsible for things out of their control; and that the idea of testing in the market place seems to have overcome the resistance of taking a risk. The Commissioner noted that other organizations have been willing to bid on projects questioned by MRBA, and in which MRBA sued to stop the projects. MRBA also claimed higher costs to taxpayers, but the bids on these jobs actually came in under the engineer's estimates, accepting the risks on the warranties.

Mr. Milo responded that MRBA members are in the business to build roads which are mainly MDOT highways. It is for the survival of their businesses and families to bid, be awarded, and build MDOT projects. Their only alternative is to go out of business. For an owner to take the attitude to push the envelope as far as possible to see how many hoops they can get contractors to jump through, may seem to be good public policy, but the Commission should be more concerned with the long-term implications of public policy.

He furthered that contractors may be willing to bid under the engineer's estimate for projects now, but in five years that may not be the case. It is the Commission's responsibility to ensure that the industry remains healthy and competitive in the best interest of the taxpayers. It is not one warranty project that will put a contractor out of business, but the cumulative liability of a number of warranty projects.

Chairman LaBelle noted that changes can be made to the policy in future years if it is shown there are problems, as it is not the intention of the Department or the Commission to run the industry out of business. A positive scenario that may develop is that a lot of innovation will be brought into the marketplace, better products being built for the taxpayers at a lesser cost. The Chairman noted this scenario is just as possible as the one Mr. Milo pointed out.

Mr. Milo responded that the Commission, Department, industry, and taxpayers should look at associated cost/benefit risks and advantages to develop a comprehensive policy. MRBA is willing to work with the Department to develop performance warranty specifications. He expressed concern that some contractors would go out of business before changes were made to the policy if adopted today.

The Chairman noted that the Department is not going to move all projects to include warranties so there will be lots of opportunities for contractors to do work on non-warranty projects, if they are uncomfortable bidding on warranty projects. The Department will be evaluating this situation over the next few years, and the Chairman does not believe any contractors will go out of business.

Director Rosine explained the general purpose of the workshop today is to provide the general direction in which the Department is moving on the warranty issue. The Department has tried to address the terminology "performance" as MRBA recommended, and has clarified what the responsibilities of the contractors are. Another issue of concern

is whether the subcontractor or the prime contractor is responsible for bonding, and the Department is willing to have discussions on this issue.

In closing, Mr. Milo asked that more time be given for the industry to meet with the Department and Mr. Isom to consider making changes to the Department's document prior to the Commission approving any policy.

Comments by Association of Underground Contractors (AUC) and Michigan Paving Association (MPA) Representative

Mike Nystrom is the Assistant Executive Director of AUC, representing over 550 companies involved in the reconstruction industry, and Executive Director of MPA, representing companies involved in over 40 percent of the MDOT asphalt pavement industry. He commented that most states have focused on materials and workmanship warranties, and Michigan is unique in discussions of contractors having design obligations and warranties associated with those obligations. Mr. Nystrom also commented that the lawsuit probably could have been avoided if the Department had addressed Items A, B, and C of the Department's proposal in their specifications on I-94 and Telegraph Road, and had discussions taken place ahead of time with the entire industry.

Commissioner Awrey asked why the lawsuit was implemented when the industry knew the issue was scheduled for discussions at the workshop today. Mr. Nystrom responded with the question, why would the Department implement specifications that would require a contractor to guarantee things that are out of his control, and why would the Department put specifications into place knowing that this discussion would take place today, and without complete industry input.

Commissioner Jackson noted that the Commission approved moving ahead with two projects at their last meeting. Chairman LaBelle also commented that the Commission heard the industry's views last month and decided to move ahead with the two projects, understanding the limited scope of what the two warranties were. In the meantime, it was noted that discussions would continue, and a communications issue was acknowledged.

Director Rosine noted that these two projects were brought forward to the Department by a segment of the industry that wanted to move forward with this issue. Chairman LaBelle also commented that the Department's policy has flexibility, and the program will be analyzed as it moves forward.

Commissioner Jackson asked Mr. Nystrom which specific items in the two noted projects are to be warrantied that are not in the contractor's control. Mr. Nystrom could not give specific details. The Commissioner furthered that it is important that the Commission adopt a policy to give clear direction on the warranty process.

Mr. Nystrom noted that the contractors that bid on the two projects last month were at least 20 percent over the engineer's estimate, and were not the low bidders, indicating that with the warranty in place there is a possibility of liability for the long term and that it was included in their bid. It is also possible that the contractor's associated with AUC and MPA had faith that the lawsuit would determine the outcome and direction of the warranty issue.

Mr. Nystrom thanked the Department for sharing the proposal with the industry prior to the meeting today. He noted his belief that the proposal was provided with a direct threat that if the components of this proposal were not acceptable and the lawsuit dropped, the Department would go on an aggressive public relations campaign against the industry to let the public know that the contracting community is not willing to stand by its work. Mr. Nystrom does not believe this is the way to work toward a compromise. Secondly, if this propaganda attempt was set into motion, it would be a campaign based on a patently untrue premise. The contractors in Michigan are, without question, willing to stand behind their work. The basic issue of a shift in liability and authority of control still remain the paramount question in the proposal. The industries are united in their belief of these issues and are committed to continue the challenge against the Department until all issues are resolved. It is the hope of Mr. Nystrom that there can be an agreement that contractors can only guarantee those items over which they have meaningful and complete control.

Mr. Nystrom distributed and provided comments on a copy of the Department's draft pavement warranty policy discussion which was marked with the industry's proposed changes. He concluded his remarks by saying the industry is willing to work with the Department to come to a final conclusion that works for everyone and is willing to stand behind their work and strive towards improved quality, noting that this issue does not need to be decided in the court system.

Comments by Michigan Concrete Paving Association (MCPA) Representative

Bob Risser, Executive Director of MCPA, and a registered engineer in Michigan, expressed his understanding from the Department's presentation there is some consensus that the contractor should only be responsible for those items that are under his control.

Mr. Risser discussed implications of turning over design elements to the contractors in light of the current procurement practices in Michigan and with federal dollars. This is a big step because a performance warranty is a certain level of a design/build warranty and these warranties transfer risk. The industry did embrace the idea of materials and workmanship warranties because it was a small risk. The transfer of the design responsibility is "a giant leap." By giving control of the elements, the Department has recognized that this is the practice of engineering on behalf of the contractor. There are very specific rules on how agencies procure engineering services as opposed to contracting services. The reason the Commission is being asked to hold off their approval of a policy is that the industry has only had the document for approximately 30 days.

Mr. Risser explained that the Brooks Act is a federal code guideline that specifically states that engineering design services need to be procured on a qualifications basis and not from low bid whenever federal dollars are involved. When a design/build project is done, a technical proposal is submitted which is scored and judged before the cost numbers are opened by the Department. This is a two-step process that is used on all design/build projects around the country because of the provision of the Brooks Act that you cannot low bid professional design work. A technical panel reviews the proposals. As design responsibilities are being transferred to contractors, there are implications about adequately protecting the public interest in the design elements that the design professional is going to be using on the project. This issue needs to be addressed in the policy.

Another issue discussed by Mr. Risser was the "waterfall effect." Currently there are five-year warranties, and a couple of seven-year warranties, with the goal of the Department to get to a ten-year warranty. The concern is that people's energy is directed toward how to save money in a low-bid setting, get through the warranty period, but leave the taxpayers holding a lesser product because the contract does say to provide a 30-year road, it says there is a warranty for a specific number of years. Mr. Risser is concerned that some contractors may figure out how to get through the warranty period and not care what happens after that. To date the performance curves are based on historical data where the Department had complete control over the design elements.

In conclusion, Mr. Risser asked that the Commission not approve a policy until the industry has more time to review the document provided by the Department.

Chairman LaBelle commented that the "waterfall effect" would influence him in the direction of longer warranties. If there is a threat that cheap roads will be built to fail at the ten-year mark, then it may be necessary to have 15- or 30-year warranties.

Mr. Rosine noted that experience shows that the long-term investments with concrete and asphalt do not fall apart after the warranty expires.

Mr. Risser reiterated that performance curves are based on historical data when the Department had complete control over the design elements. Chairman LaBelle commented that all decisions would not be based solely on past data bases, and feels this is not a valid point.

Public Comments

Keith Carey, a legislative aid to Michigan State Representative Scott Shackleton's office, provided a copy of a letter from the Representative dated April 24, 2002, and gave a summary of the document.

Representative Shackleton believes very strongly in the continued development of the pavement warranty policy, and that all members of the industry should be included in the discussions.

Chairman LaBelle asked Mr. Carey to convey to Representative Shackleton that the Commission is committed to making sure contractors will not be held responsible for items that are not under their control. The Chairman asked Director Rosine to respond to the Representative's letter in writing to address his concerns.

Final Comments

Mr. Milo concluded with his thought that the document provided to the Commission today is a reaction to the lawsuit, and realizes the Commission may feel obligated to adopt a policy today. He asked that, since the trial date is in June and there is a Commission meeting in May, a decision on a policy be withheld until that time.

Chairman LaBelle commented that adoption of a policy on warranties is not a strict reaction to the lawsuit, although the lawsuit may have affected the timing of the policy.

Rayburn King provided his final comments. The states of Wisconsin, Indiana and Ohio are all currently doing performance warranties. Also, MAPA's contractors bid the I-94 job with hot-mix asphalt, which meant the contractor had to drive past several competing asphalt plants to get to the job. This is a very good explanation for the difference in bid prices rather than the suggestion that the job was padded because of liabilities associated with the warranty, as was indicated earlier in conversations. He then clarified the misunderstanding that a warranty was placed on the Telegraph Road project at the last minute before going out to bid as MAPA went to the Department in May of 2001 with a recommendation for a new asphalt design, and was a demonstration project.

ADJOURNMENT

Chairman LaBelle adjourned the meeting at 10:00 a.m.

Commission Advisor